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IN THE

Supreme Court of the United States

..... TERM, 1965

NO. 481

IN RE: PETITION OF BABCOCK BOULEVARD LAND COMPANY, INC., FOR THE APPOINTMENT OF VIEWERS TO ASCERTAIN THE DAMAGES ARISING FROM THE CONSTRUCTION OF L. R. 765, SECTION 3A IN ROBINSON TOWNSHIP, ALLEGHENY COUNTY, PENNSYLVANIA

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APPEAL OF RED JACKET COMPANY, INC.

PETITIONS FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR WRIT OF CERTIORARI

Petitioners Babcock Boulevard Land Company, Inc., and Red Jacket Company, Inc., by their counsel, John B. Nicklas, Jr., of McCrady & Nicklas, pray that a writ of certiorari issue to review the orders of the Supreme Court of Pennsylvania, affirming the orders of the Court of Quarter Sessions of Allegheny County, Pennsylvania.

Questions Presented.

OPINIONS BELOW

The Report of the Board of Viewers was filed on April 5, 1960. The opinion of the Court of Quarter Sessions of Allegheny County, Pennsylvania, was filed on September 25, 1964. The Supreme Court of Pennsylvania filed Per Curiam opinion on May 25, 1965. These opinions are appended hereto in accordance with Rule 23 subparagraph 1 (a) (1) of your Honorable Court.

JURISDICTION

The orders of the Supreme Court of Pennsylvania were entered on May 25, 1965.

Jurisdiction of the Court is invoked under 28 U.S.C.A. 1257 (2) and 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

I. Is the deprivation of a property owner's right of access to his land (either total or partial) a property right within the meaning of the Fifth and the Fourteenth Amendments to the United States Constitution, and therefore compensable if interfered with by the Commonwealth of Pennsylvania?

Negatived by the court below.

II. Is Section 8 of the Limited Access Highway Act of May 29, 1945, P.L. 1108 (36 P.S. 2391), which denies compensation to a property owner unless some of his property is actually taken, a violation of due process, and therefore unconstitutional and void?

Negatived by the court below.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 28 U.S.C. Const. Amend. 14.

Amendment V to the Constitution of the United States:

> ". . . nor shall private property be taken for public use, without just compensation." 28 U.S.C. Const. Amend. 5.

Article 1, §10, Clause 1:

> ". . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." 28 U.S.C. Const. Art. 1, Sec. 10.

Article 1, §10 of the Pennsylvania Constitution:

> "No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. No person shall, for

the same offense, by twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." Penna. Purdons Art. 1, Sec. 10.

Article 16, §8 of the Pennsylvania Constitution:

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction." Penna. Purdons Art. 16, Sec. 8.

Section 8 of the Limited Access Highway Act of May 29, 1945, P.L. 1108 (36 P.S. 2391.8):

"* * * The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway or by a change of the width or lines of any intersecting streets or roads shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken. * * * For the purpose of constructing limited access highways, local service highways, or intersections, streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided."

STATEMENT OF THE CASE

Certiorari is sought in these cases to review the Orders of the Supreme Court of Pennsylvania affirming the Court of Quarter Sessions of Allegheny County, Pennsylvania, which denied appellant property owners damages for deprivation of right of access to Ramp A and the Parkway West (a limited access road) by the Department of Highways of the Commonwealth of Pennsylvania which erected a permanent barricade across the same in front of petitioners' property, although the property owners had been using it for more than five (5) years. The Board of Viewers, the Quarter Sessions Court and the Pennsylvania Supreme Court all held that under Art. I, Sec. 10 of the Pennsylvania Constitution and the Limited Access Highway Act of May 29, 1945, P.L. 1108 (36 P.S. 2391) no damages could be awarded the property owners because no physical land or dirt had been taken and further, that the barricading off of the Ramp, thereby depriving the property owners of access to the Parkway West, was non-compensable under the police powers of the State Highway Department.

At Nos. 2 and 3 November Sessions, 1959, Road Docket, Court of Quarter Sessions of the Peace of Allegheny County, Babcock Boulevard Land Co., Inc. (hereinafter called "Babcock") and Red Jacket Co., Inc. (hereinafter called "Red Jacket"), respectively, filed Petitions for Viewers to assess damages against the Commonwealth of Pennsylvania (Department of Highways) for shutting off access to Ramp A to Parkway West on October 9, 1957.

Viewers were appointed, heard testimony, and disallowed appellants any damages, holding that the action

of the Commonwealth, did not constitute a condemnation and taking of any part of claimants' property; that said action by the State Highway Department was in accordance with the provisions of Section 4 of the Limited Access Highway Act of 1945, P.L. 1108 (36 P.S. 2391); that claimants' right to recover must rest upon some constitutional or statutory provision and, in the absence of such, there can be no damages imposed on the Commonwealth. (R. pp. 71a-73a, 94a, 97a).

Exceptions to the Viewers' Report were timely filed in the Court of Quarter Sessions of Allegheny County, Pennsylvania, and appellants also filed timely appeals to the Court of Common Pleas of Allegheny County at Nos. 1445 and 1446 July Term, 1960. The Commonwealth filed motions to quash those appeals to the Common Pleas Court on the theory that appellants had no right to a trial by jury for the ascertainment of damages since as a matter of law there was no actual physical taking of ground and consequently no damages could be awarded. After oral orgument and written briefs, the Common Pleas Court en banc (Aldisert and Smart, JJ.) denied the motions to quash, but ordered said appeals not be listed for trail by jury until the questions of law raised by the exceptions in Quarter Sessions Court should be finally adjudicated, without prejudice to the Commonwealth to renew its motions to quash following such final adjudication. Consequently, the appeals in the Common Pleas Court are being held in abeyance.

The question of whether deprivation of Petitioners right of access by the Commonwealth was a compensable property right within the meaning of the Fifth Amenment and Fourteenth Amendment to the United States

Constitution was presented both in the written briefs and oral argument on the exceptions filed to the Board of Viewers Report before Quarter Sessions Court. The Quarter Sessions Court dismissed the exceptions, and in its opinion, stated that while the Fifth Amendment is applicable to the states through the Fourteenth, these were inapplicable with regard to the issue of access rights when the Commonwealth is the condemnor. (Record p. 113a, p. 121a).

An Appeal was taken to the Pennsylvania Supreme Court where questions of the applicability of the Fifth and Fourteenth Amendment were again submitted in both the written brief and oral arguments before the Court. A Per Curiam Opinion was filed affirming the Quarter Sessions Court Orders on May 25, 1965.

The facts involved in the instant petitions are as follows:

(a) Petitioners are the owners of respective commercial tracts of land in Robinson Township, Allegheny County, Pennsylvania, abutting on a public highway known as Parkway West. Babcock Boulevard Land Company, Inc. acquired title to its property by deed from George Peat et ux. dated December 19, 1952, recorded in Deed Book Vol. 3255, page 27; Red Jacket Company, Inc. acquired title to its adjoining tract by deed from Babcock Boulevard Land Company, Inc. dated November 30, 1954, recorded in Deed Book Vol. 3591, page 614. The Babcock Company's commercial tract is unimproved; the Red Jacket tract has erected thereon a commercial building in which Red Jacket conducts its business.

(b) On June 2, 1950, the Commonwealth of Pennsylvania located and constructed in Allegheny County a limited access highway designated as L. R. 765, Section 3A, popularly known as the Penn-Lincoln Parkway West. At what was to be known as the Rosslyn Farms Interchange, located at the boundary line between Rosslyn Farms Borough and Rosslyn Township, Ramp A was planned and actually constructed. At the time of the condemnation of June 2, 1950, all of the property now owned by Babcock and Red Jacket was owned by an individual named George Peat.

(c) On June 23, 1952, George Peat, predecessor in title to the commercial land now owned by petitioners, made a settlement with the Commonwealth of Pennsylvania for the approximately 8 acres of his land appropriated by the Commonwealth for the sum of $8,000, and executed Form 474-B of the Commonwealth titled "Deed of Release and Quitclaim, Limited Access Highway," whereby he released "the Commonwealth or any agency or political subdivision thereof for or on account of any taking, injury or destruction of property or by reason of the improvement of said road * * * or by reason of the deprivation of the right of access, egress and ingress to and from the section of highway, or through or by reason of the subsequent maintenance thereof according to the standards of the Department of Highways. A plan showing the proposed improvement is hereto attached and made part of this release." The plan attached to the release provides for access to Ramp A to the Penn-Lincoln Highway. The following legend also appears on the back of the plan.

"LIMITED ACCESS HIGHWAY

This print is made from Sheet No. 12, of right-of-way plan for Route No. 765, Section No. 3A, Allegheny County, approved by the Governor on June 2, 1950, which I have examined and had explained to me this 23rd day of June, 1952, and is to be attached to the release herewith executed.

S/ Philip L. Meyer Witness

S/ George Peat Seal"

(d) Peat subsequently conveyed all of his land to Babcock, which in turn later conveyed a portion thereof to Red Jacket, which erected a factory building thereon and used Ramp A for access to the Parkway until October 9, 1957, when a plan revision was signed by the Governor of the Commonwealth and a barricade was erected across Ramp A, thereby depriving Red Jacket, as well as Babcock, from access thereto.

(e) As a result of barricading petitioners' property from Ramp A, Red Jacket can only gain access to its commercial building by an inaccessible road by a circuitous three-mile route through the Borough of Carnegie which is steep, precipitous, inaccessible and unimproved, and involves the use of a jeep to carry its merchandise in and out of the plant to the bottom of a hill and thence loading and unloading onto trucks at considerable expense and inconvenience because of the inaccessibility of ingress and egress.

(f) Babcock Company, one of the petitioners, also filed a civil action in the United States District Court for the Western District of Pennsylvania at No.

16973, against Louis M. Stevens, Secretary of Highways of the Commonwealth, and George M. Leader, Governor of the Commonwealth, seeking injunctive relief to force said defendants as officials of the Commonwealth to remove the barricade of Ramp A. Hearing thereon was held September 25, 1958, before Staley, McIlvaine and Marsh, JJ., at the conclusion of which it was agreed by counsel for Babcock Company and for the defendants that decision should be delayed by the court until after the United States Supreme Court had acted in the case of Park H. Martin, Successor to Joseph Lawler as Secretary of Highways of the Commonwealth of Pennsylvania et al. v. Creasy et al. 360 U.S. 219. In the Creasy case the United States Supreme Court held that it could not take jurisdiction because the property owner had not first exhausted his remedies in the Pennsylvania Courts.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

The Deprivation of Petitioners' Access to Ramp A by the Commonwealth Without Just Compensation Is Violative of the Fifth and Fourteenth Amendments of the United States Constitution.

It seems crystal-clear (and the Opinion of the lower court agrees) that there has been a radical change in Pennsylvania decisions from the early decisions which denied a property owner damages unless land or dirt was actually taken, under the wording of Article I, Section 10 of the Pennsylvania Constitution, and that later decisions have recognized consequential damages and incorporeal rights as compensable. *Soldiers' and Sailors' Memorial Bridge,* 308 Pa. 487 (162 Atl. 309, 310); Appointment of Viewers to Assess Damages to Property of Roland A. McCrady, 399 Pa. 586 (160 A. 2d 715).

As Mr. Justice Holmes said in his opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393 (in which he declared Kohler Act of May 27, 1921, P.L. 1198 unconstitutional):

> "While such regulations may not physically take the property, they do so regulate its use *as to deprive the owner of a substantial right therein without compensation.* 'We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change': White's Appeal, 287 Pa. 259, 266, 134 A.409" (emphasis supplied).

In *Martin v. Creasy*, 360 U.S. 219, Creasy obtained an injunction against the Superintendent of Highways of the Commonwealth of Pennsylvania in the United States District Court for the Western District of Pennsylvania (Marsh, J.) to enjoin the Department of Highways from denying him access to the Parkway West. The United States Third Circuit Court affirmed, but the United States Supreme Court reversed only because it held that Creasy should first exhaust his remedy in the Pennsylvania courts. The court's opinion, however, makes it clear that a property owner should not be deprived of his right of access without compensation because of the difference in the language between *Article I, Section 10* and *Article XVI, Section 8 of the Pennsylvania Constitution*, nor under the provisions of *Section 8* of *the Limited Access Highways Act of 1945* (as discussed under Point II of this Brief). The decision indicates that access is a compensable right, the confiscation of which, by the Commonwealth, without compensation is violative of the Fifth and the Fourteenth Amendments of the Federal Constitution. The majority opinion was delivered by Justice Stewart:

> "There is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase 'actual taking of property.' If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the *Commonwealth has deprived them of their property without due process of law, this Court will be here*" (emphasis supplied).

We respectfully submit that the Creasy opinion above quoted completely supports petitioners' view, for here petitioners find themselves in a situation anticipated

by the United States Supreme Court with respect to the Parkway West.

Mr. Justice Douglas of the United States Supreme Court believed that the delay and expense of first should be avoided and that the United States District Court and the Circuit Court of Appeals were correct in assuming jurisdiction. Mr. Justice Douglas stated:

> "* * * We have at bottom in this case a question whether access to a highway is a property right which is compensable under the Fifth and Fourteenth Amendments. If it is compensable, as the District Court ruled, see 160 F. Supp. 404, 410-412, this is the most appropriate time to make the announcement. Particularly is this so when appellees in this case sought a declaration by the state court of their rights under the statute and were told that 'their constitutional rights, whatever they may be, will be guarded and protected.'
>
> * * * * * * *
>
> "That question concerns not state law but a concept imbedded in the Bill of Rights. It is in no way entangled with local law. The Supremacy Clause of the Constitution makes all local projects bow to that concept of 'property'".

The opinion of the court below dismisses the Fifth and Fourteenth Amendments of the United States Constitution and the decisions of the Supreme Court of the United States — *United States v. Causby*, 328 U.S. 256; *Griggs v. Allegheny County*, 369 U.S. 84, and *Martin v. Creasy, supra* — holding that the wording of Article I, Section 10 of our Pennsylvania Constitution should pre-

vail over the Federal Constitution and the Federal decisions.

The lower court opinion also erroneously assumes that there must be a total deprivation of an existing right of access in order for the property owner to have a compensable action in damages (R. 129a, 130a).

However, it is clear that *Martin v. Creasy, supra,* rejects the proposition that loss of total access is a prerequisite before a right of action accrues in the property owner. In *Creasy,* Mr. Justice Douglas stated:

> "Whether or not the landowners will be left landlocked or given access to substitute service roads goes only to the question of the amount of property 'taken', if any. *It has nothing to do with the question of the landowner's property right in access to a highway abutting his land"* (emphasis supplied).

The court below further states (R. 127a):

> "Common sense would indicated that there was no intent that the plan should confer on George Peat a contract right. * * * the Commonwealth be required to surrender its police power over that portion of the Parkway to his discretion."

We concede and there can be no doubt that the Commonwealth should and did retain its right to revise the plan whenever, in the exercise of its power of eminent domain under the Limited Access Highway Act, it cared to do so; but this should not deprive appellants of compensation from the Commonwealth for the appropriation of appellants' access rights to Ramp A.

As stated in: — In *Cincinnati v. Louisville R.R. Co.*, 223 U.S. 390:

> "This clause [Art. I, Sec. 10, Clause 1] is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated."

The consideration for the execution and delivery of the Deed and Release by Peat was the payment by the Commonwealth to him of $8,000 and the grant of access rights to Ramp A as graphically shown on the plan attached thereto; thus a property right in Peat and his successors in title was established.

In *Creasy* (160 F. Supp. 404 U.S. Dist. Ct. Western Dist. of Pa.) Judge Marsh said:

> "The Pennsylvania Limited Access Highway Act as applied to them (the plaintiffs) is violative of the Fourteenth Amendment of the United States Constitution in that it deprives them of their property without due process of law, and denies them the equal protection of the laws. See *Del. L. & W. R.R. v. Morristown*, 276 U.S. 182 (1928), at 193, for a discussion of compensation as an element of due process; see also 16A C.J.S. Con. Law paragraph 646."

It seems clear that the Legislature cannot deprive a property owner of his constitutional right to damages

simply by the passage of an act which attempts to eliminate or restrict that right. The requirement of due process is not satisfied merely by legislative declaration that no remedy is available (as in the Limited Access Highways Act).

In *Rich Rill v. Bashore,* 334 Pa. 449, at 478, the Court said:

> "Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove * * * certain fundamental rights which have been always recognized and observed in judicial procedures."

In short, the Assembly may not define a confiscatory taking as lawful and thus by definition defeat the requirements of the Fourteenth Amendment.

In *Donovan v. Penna. Co.,* 199 U.S. 279, 301, 302 (1905) the Supreme Court of the United States, in discussing the right of abutting property owners to access to a street or road, said:

> "'* * * The right may be regarded in the nature of an incorporeal hereditament.' * * * The general doctrine is correctly stated in Dillon on Municipal Corporations: 'For example, an abutting owner's right of access to and from the street, subject only to ligitimate public regulation, is as much his property as his right to the soil within its boundary lines. When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property.'"

In *Breinig v. Allegheny County,* 332 Pa. 474, at 480, the Pennsylvania Supreme Court said:

> "Where land is taken or purchased for highways, the abutting owner retains, as an incident to ownership of the remainder of his land, the right of access, or of ingress and egress. This right cannot be taken from him unless compensation is made therefor under the law. *It is a property right, protected by the Constitution"* (Emphasis supplied)."

To the same effect *Stuart v. Gimbel Brothers,* 285 Pa. 102, *Griggs v. County of Allegheny,* 369 U.S. 84 (402 Pa. 411) 168 At. 2d 123).

The court below concedes that an abutting property owner's right of access is a property right or an *easement appurtenant* but it nevertheless concludes that Babcock and Red Jacket have not been injured because no *dirt or land* was actually taken by the Commonwealth (Department of Highways) on October 9, 1957, when it barricaded off petitioners from access to Ramp A. The court says:

> "The basic issue before the court is whether or not the 'easement' of access is a property right for the deprivation of which the Commonwealth is liable in damages under Article I, Section 10 of its Constitution" (Opinion, p. 113a).

The opinion then compares the language of Article I, Section 10, which it admits is substantially identical to the Fifth Amendment to the Federal Constitution, to Article XVI, Section 8, of the Pennsylvania Constitution.

The court below then concludes that "Article I, Section 10, applies to both the Commonwealth and those to

whom it delegates this power, while Article XVI, Section 8, applies only to 'municipal and other corporations and individuals' " (citing cases). * * *

> "Thus in the absence of any statutory assumption of liability, the Commonwealth as condemnor is required to make compensation for property *taken,* but apparently is not under the same compulsion where property is *injured or* destroyed" (Opinion 115a).

The lower court then reaches a startling and inconsistent conclusion (123a):

> "While we concur both in the holding that there need no longer be a physical appropriation of land to constitute a taking of property, and that access is a property right by virtue of Article XVI, Section 8 and various legislative enactments applicable to 'municipal and other corporations and individuals', *we cannot agree that this amounts to a declaration that access is a compensable property right where the condemnor is the Commonwealth.*" (Emphasis supplied).

It is petitioners' contention that the distinction thus drawn between these two sections of the Pennsylvania Constitution is unsound, fallacious and violative of petitioners' constitutional rights.

The Commonwealth contends that the act of the Secretary of Highways and the Governor of Pennsylvania on October 9, 1957, in barricading of petitioners' property from Ramp A, was a lawful exercise of police power and does not constitute a taking of property. The Commonwealth argues, further, that petitioners' consti-

tutional rights are not violated because petitioners have other means of access to Bell Road. We respectfully submit that, although petitioners may have access by an unsatisfactory and circuitous route to their properties from the back streets of Carnegie, nevertheless they have suffered the loss of a property right by reason of the Department of Highways barricading them off from the Parkway West. Compensation for loss of access to a main artery by an abutting property owner, as in the instant cases, is not dependent upon their having no other means of access.

In *Appointment of Viewers to Assess Damages to Property of Roland A. McCrady,* 399 Pa. 586, 160 A.2d 715, the Governor and Secretary of Highways of the Commonwealth of Pennsylvania condemned a strip of ground along both sides of the triangular plot of ground owned by McCrady at the intersection of U.S. Route 20 and Pa. Highway Route 5, in Springfield Township, Erie County, Pennsylvania. A curb ranging in height from 6 inches to 12 inches on the outside of the triangular plot was erected, thereby creating an island, which deprived the owner of access to his gasoline station and restaurant erected on said piece of ground. He was forced to move both buildings back in order to make them usable. The Supreme Court affirmed the verdict of $27,500 in favor of the property owner, which included consequential damages for the injury, necessitating the moving of the gas station and restaurant. Mr. Justice B. R. Jones, speaking for the Pa. Supreme Court (1960), quoted *White's Appeal,* 287 Pa. 259, as follows:

> "Police power should not be confused with that of eminent domain. Police power controls the use

of property by the owner for the public good, its use otherwise being harmful, while eminent domain * * * takes property for public use. Under eminent domain, compensation is given for property taken, injured or destroyed, while under the police power, no payment is made for diminution of use, even though it amounts to an actual taking or destruction of property."

In the *McCrady* case, the Commonwealth further relied on Section 420 of the Highway Law of 1945, P.L. 1242, Article IV (36 P. S. 670-420), which empowers the Secretary of Highways to make reasonable rules and regulations governing the use of all State highways, and, by the construction of curbs, divisor strips, painted lines or signs, etc., to control the direction of the flow of traffic thereon. In other words, the Commonwealth contended that it could not be liable in damages since it erected the curbing around the McCrady property under its police powers. This argument was also rejected by the Supreme Court, viz."

"What the Commonwealth attempts to do is clear and evident: *under the guise of the police power it seeks to accomplish indirectly that which it cannot accomplish directly.* The Commonwealth attempt to justify the curbing as an exercise of its police power and the taking as an exercise of its power of eminent domain in an attempt to escape liability for the damages which appellee so obviously suffered, cannot be condoned." (emphasis supplied).

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter

cut than the constitutional way of paying for the change.

"Absolute and unlimited police power is one of the twin pillars on which Communism and every totalitarian regime and every dictatorship is based, maintained and kept in power. It is a doctrine and a power which is repungant to our Birthright of Liberty, our Constitution, our traditions and our American Way of Life." (Key Realty Co. Appeal, 408 Pa. 98).

II

Section 8 of the Limited Access Highway Act of May 29, 1945, P. L. 1108 (36 P.S. 2391.8) Which Denies Consequential Damages Where No Property Is Taken, Is Violative of Due Process.

A. Section 8 of the Limited Access Highway Law of 1945 reads as follows:

"* * * The owner or owners of private property affected by the construction or designation of a limited access highway shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken. * * *"

The Commonwealth's position is that, by virtue of the Limited Access Highway Law of 1945, it is only liable where land or dirt is actually taken. On the other hand, it is appellants' contention that the aforesaid language in Section 8 of the Limited Access Highway Law uses the word "property" as distinguished from the use of the word "land". "Property" is a general term and

would include incorporeal hereditaments, easements, and any and all property rights; hence, to construe the word "property" as synonymous with "land" is erroneous.

Had the Legislature intended this narrow construction, it would have used the terminology "land" or "real property". If, on the other hand, the Legislature meant to identify or equate the term "property" with "land", then its clear intention was to deprive appellants or any other citizen of compensation for the loss of incorporeal property rights of egress and ingress to or across a limited access highway, contrary to the Fifth and Fourteenth Amendments of the Federal Constitution, in that it would deprive citizens of their property without due process of law.

The Pennsylvania Court has recognized that a taking is compensable under eminent domain, without necessarily including the physical appropriation of land: *Gardner v. Allegheny County,* 382 Pa. 88, 116 (114 A. 2d 491, 1955). In the Gardner case, airplanes flew below the air space devoted to the general public and the Pennsylvania Court held that "the use of any part of an owner's property is a taking of it." In the concurring opinion of Mr. Justice Stearne, the case of *U. S. v. Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, was cited with approval as follows:

> "When airplanes habitually fly so low as to dangerously interfere with the use and enjoyment of property adjacent to or adjoining air fields, whether authorized or not, it constitutes a taking of property for which compensation may be allowed."

Thus in *Griggs v. County of Allegheny,* 369 U. S. this was presented with a statute purporting *to place the*

glide paths into airports in the public domain, and also with an interference with a landowner's use and enjoyment of his property caused by constant low flights over his land. In his opinion in *Griggs,* Mr. Justice Douglas recognized the existence of this statutory provision, *but summarily dismissed it* by quoting from *Causby* that the use of land presupposes the use of some of the airspace above it.

The holding in *Griggs* is clearly that a landowner's constitutional right to just compensation for taking of his property cannot be avoided *by a Congressional declaration as to the limits of navigable airspace.*

Accordingly, the Griggs case settles once and for all the proposition that landowners must be compensated for easements taken over their property. The measure of damages is the depreciation in value of the property as a result of the taking of such air easements. *Johnson v. Airport Authority of the City of Omaha,* 173 Neb. 801, 115 N. W. 2d 426 (1962); *Jensen v. United States,* 305 F. 2d 444 (Ct. Cl. 1962); *Dick v. United States,* 169 F. Supp. 491 (Ct. Cl. 1959); *United States v. 1040.30 Acres of Land,* 144 F. Supp. 299 (W. D. La. 1956); *United States v. 48.10 Acres of Land,* 144 F. Supp. (S.D.N.Y. 1956).

That a state court may define property rights and that the Supreme Court of the United States will not question such definition, *Sauer v. New York,* 206 U.S. 536 (1907) has obviously been strictly limited by such subsequent decisions as *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393. That case is one of the milestones in the development of the protection afforded by the federal courts to private persons against the invasion of their rights by state legislatures under the guise of the

police power. In that case, the United States Supreme Court held that the State of Pennsylvania could not constitutionally under the aegis of the police power deprive the owners of unmined coal of their right to damage the surface of the land by removing the coal. Justice Holmes said, at page 415: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

B. Section 8 of the Statute here under attack provides, *inter alia*, as follows:

> "For the purpose of constructing limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided."

The Limited Access Highways Act of 1945 denies to appellants equal protection of the laws. The statute expressly provides a procedure by which the Secretary of Highways may purchase property for constructing limited access highways; it is silent concerning his authority to purchase property upon conversion of an existing road to a lmited access highway. It would appear that the Legislature by this significant omission has placed a large class of land owners, including appellants, beyond the pale.

Appellants believe that this language creates a completely arbitrary discrimination between owners of land abutting newly constructed highways and those abutting existing highways. This statute reveals no express procedure by which a land owner, upon deprivation of access alone, may bring a claim before a Board of

Viewers. Indeed the viewers, as well as the quarter sessions court have denied appellants their right to initiate proceedings from compensation.

Another discrimination appears when the present statute is compared with the act which authorized the Pennsylvania Turnpike, a pioneer in the development of limited access: Act of May 21, 1937, P. L. 774, No. 211. (36 Purdons Pennsylvania Statutes Annotated, Section 652, *et seq.*) By that statute the Turnpike Commission was authorized and empowered to acquire by condemnation: "Any lands, rights, easements, franchises or other property deemed necessary or convenient for the construction or efficient operation of the turnpike in the matter hereafter provided." The General Assembly thus provided for compensation to property holders for damages arising from the loss or deprivation of access. The discrimination appears when we compare the quoted language of the Turnpike law with another clause of the same section 8 of the Limited Access Highway Act: "The Commonwealth shall not be liable for consequential damages where no property is taken". There is no reasonable distinction between property owners who reside along a non-access highway entitled The Pennsylvania Turnpike and the property only a few miles distant along a highway known as the Greater Pittsburgh Airport Parkway.

There is a third and, appellants believe, a most extreme discrimination, practically unparalleled in the law, in Section 8 of the Limited Access Highways Act.

> "The Commonwealth shall not be liable for consequential damages where no property is taken; Provided, however, that the Secretary of Highways

> shall have authority to enter into agreement for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance."

That section authorizes the Secretary of Highways to pay damages for the loss of access in some cases but not in others. If municipal authorities decide that they have a moral obligation to pay for the loss of access, or a political obligation, or a personal favor to pay, they may make this municipality liable for payment of said damages, and the Secretary of Highways may decide to contribute funds of the Commonwealth to such payment. What is or is not a compensable property right then will be determined in each instance by the discretion of local political authorities. Access may thus be a compensable property right in one landowner and not in his neighbor. Such a flagrant statutory authorization of discrimination seems unique in the history of the law of eminent domain. It is a reasonable interpretation of the statute to predict that local policy will favor friends and punish enemies with complete freedom by resolving to pay or not to pay for the taking of access.

The fortunate owners of abutting property who would be compensated for their loss of access would be those with sufficient political or other influence upon local governing bodies to prevail upon them to pass the required "proper resolution or ordinance". No chopping of logic can justify this wholesale delegation to any person or agency. Furthermore, the statute is silent regarding what proportion of damages the Secretary may decide to pay in the instances where contribution is

made. Here again the political status of individuals affected and other factors completely beyond the control of the law may govern.

It might well be argued that when the legislature conferred this privilege upon the Secretary of Highways it recognized, in a sort of left-handed way, that such right of access is a compensable property right; otherwise why permit such payment, even on a discriminatory basis?

This indefensible discrimination between owners itself would be sufficient to refute appellee's argument that the police power will support the statute under attack. The police power does not justify arbitrary discrimination anymore than it justifies deprivation of property, as set forth earlier. *Pennsylvania Coal Company v. Mahon, supra.* 260 U.S. 393 (Holmes)

This Court should not interfere with a legislative classification which is based upon any reasonable difference: *Williamson v. Lee Optical of Oklahoma,* 348 U. S. 483 (1955); but as stated in *Morey v. Doud,* 354 U. S. 457, 464:

> "'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 37-38, 48 S. Ct. 423, 425, 72 L. Ed. 770; Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U. S. 459, 462, 57 S. Ct. 838, 840, 81 L. Ed. 1223 * * *. A statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is

found. Smith v. Cahoon, 283 U. S. 553, 51 S. Ct. 582, 75 L. Ed. 1264."

Again, comparing the Limited Access Highway Act with the Pennsylvania Highway Act of June 1, 1945, P. L. 1242, § 523 (36 P. S. 670-523), the latter statute assures the affected property owners of damages from one source or another; whereas the former act (the Limited Access Highway Act) makes recovery contingent upon not just one, but two completely voluntary acts; first, that of the governing body of the particular township, borough, city or county where the deprivation of access takes place, and second, that of the Secretary of Highways. In the instant case, the Secretary of Highways and the Governor of Pennsylvania have deprived appellant property owners of access without compensation.

CONCLUSION

The Department of Highways of Pennsylvania should not be permitted to abrogate its contract with Peat, petitioners' predecessor in title, by destroying access to Ramp A and the Parkway West under guise of the Commonwealth's Police Power; nor should petitioners summarily be denied due process under the erroneous assumption that the Limited Access Highway Act of 1945 and Article I, Section 10 of the Pennsylvania Constitution supersede the Fifth and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

JOHN B. NICKLAS, JR.
McCRADY & NICKLAS
Attorneys for Petitioners

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: PETITION OF BABCOCK BOULEVARD LAND COMPANY, INC., FOR THE APPOINTMENT OF VIEWERS TO ASCERTAIN THE DAMAGES ARISING FROM THE CONSTRUCTION OF L. R. 765, SECTION 3A IN ROBINSON TOWNSHIP, ALLEGHENY, PENNSYLVANIA APPEAL OF BABCOCK BOULEVARD LAND COMPANY, INC.	No. 85 March Term, 1965
IN RE: PETITION OF RED JACKET COMPANY, INC., FOR THE APPOINTMENT OF VIEWERS TO ASCERTAIN THE DAMAGES ARISING FROM THE CONSTRUCTION OF L. R. 765, SECTION 3A IN ROBINSON TOWNSHIP, ALLEGHENY COUNTY, PENNSYLVANIA APPEAL OF RED JACKET COMPANY, INC.	No. 86 March Term, 1965

Opinion of the Court

Filed May 25, 1965

Orders affirmed.

Per Curiam.

Musmanno, J. dissents.

Report of Viewers

No. 2 November Sessions, 1959

(Filed April 5, 1960)

To the Honorable, the Judges of Said Court:

The undersigned Viewers, appointed by your Honorable Court in the above entitled case for the purpose set forth in the praecipe herewith returned, respectfully report:

That having given notice as required by law of the time and place fixed by the Court for viewing said premises, to-wit: December 3, 1959, at 10:30 A.M., they met thereon on the date and at the said time and viewed the premises and road located and constructed thereon, and then and there adjourned to meet at the Hearing Room of the Viewers in the City-County Building, Grant Street, Pittsburgh, Pennsylvania, on the 17th day of February, 1960, at 9:30 o'clock, A.M. for the purpose of hearing the testimony of the parties in interest.

Pursuant to said adjournment, they met at the time and place fixed and heard all the evidence offered by the parties interested and their witnesses, both the claimants and the Commonwealth of Pennsylvania being represented by Counsel.

After hearing and considering the said testimony the Viewers do now find and report as follows:

That on October 9, 1957, the said BABCOCK BOULEVARD LAND COMPANY, INC., was the owner of a tract of land situated in ROBINSON TOWNSHIP, Allegheny County, Pennsylvania, particularly described in the Petition in this proceeding, said land abutting on the Penn Lincoln

Parkway West as show on Viewers' Plan marked Exhibit 4, and State Highway Plan marked Exhibit 1-A, both being attached to this Report and made part hereof; that through said tract of land is a Township road known as Bell Road, extending from Carnegie Borough through Robinson Township and now intersecting with Ramp "A" of said Penn Lincoln Parkway.

It is alleged by the claimant herein that on October 9, 1957, the Secretary of Highways and the Governor of the Commonwealth of Pennsylvania proceeded to deprive claimant of certain alleged property rights in said tract by closing, with a barrier, the entrance from the tract via Bell Road to Ramp "A" of the Parkway, and that said closing accomplished a condemnation and thereby making claimant's land valueless.

Based on an examination of the Viewers' Plan and the State Highway Plan and consideration of the testimony before this Board, it is the opinion of the Viewers that said action does not constitute a condemnation and taking of any part of claimant's property. That said action in no way interferes with the tract of land abutting Bell Road, but it only amounts to a change in ingress and egress to the Parkway by traversing Bell Road in a different direction than formerly. That said action by the State Highway Department was in accordance with the provision of Section 4 of the Limited Access Highway Act of 1945, P. L. 1108.

It is the opinion of the Viewers that claimant's right to recover must rest upon some constitutional or statutory provision, and in the absence of such there can be no liability for damages imposed on the Commonwealth. Consequently claimant's right to damages is

refused. However, the Viewers' award to T. J. McGovern, the sum of ONE HUNDRED FIFTY and no/100ths ($150.00) DOLLARS for engineering services rendered in the preparation of the Viewers' Plan, said sum to be payable by the Commonwealth of Pennsylvania.

All of which is respectfully submitted this 5th day of April, 1960.

H. S. DOUGLASS
JOHN J. O'KEEFE
CHARLES M. HALLORAN
Viewers

Report of Viewers

No. 3 November Sessions, 1959

(Filed April 5, 1960)

To the Honorable, the Judges of Said Court:

The undersigned Viewers, appointed by your Honorable Court in the above entitled case for the purpose set forth in the praecipe herewith returned, respectfully report:

That having given notice as required by law of the time and place fixed by the Court for viewing said premises, to-wit: December 3, 1959, at 10:30 o'clock, A.M., they met thereon on the date and at the said time and viewed the premises and road located and constructed thereon, and then and there adjourned to meet at the Hearing Room of the Viewers in the City-County Building, Grant Street, Pittsburgh, Pennsylvania, on the 17th day of February, 1960, at 9:30 o'clock, A.M. for the purpose of hearing the testimony of the parties in interest.

Pursuant to said adjournment, they met at the time and place fixed and heard all the evidence offered by the parties interested and their witnesses, both the claimant and the Commonwealth of Pennsylvania being represented by Counsel.

After hearing and considering the said testimony the Viewers do now find and report as follows:

That on October 9, 1957, the said RED JACKET COMPANY, INC., was the owner of a tract of land situated in ROBINSON TOWNSHIP, Allegheny County, Pennsylvania, particularly described in the Petition in this proceeding, said land abutting on the Penn Lincoln Parkway West as shown on Viewers' Plan marked Exhibit 1, and attached to this Report and made part hereof; that abutting said tract of land is a Township road known as Bell Road, extending from Carnegie Borough through Robinson Township and now intersecting with Ramp "A" of said Penn Lincoln Parkway.

It is alleged by the claimant herein that on October 9, 1957, the Secretary of Highways and the Governor of the Commonwealth of Pennsylvania proceeded to deprive claimant of certain alleged property rights in said tract by closing, with a barrier, the entrance from the tract via Bell Road to Ramp "A" of the Parkway, and that said closing accomplished a condemnation and thereby making claimant's land valueless.

Based on an examination of the Viewers' Plan and the State Highway Plan and consideration of the testimony before this Board, it is the opinion of the Viewers that said action does not constitute a condemnation and taking of any part of claimant's property. That said action in no way inteferes with the tract of land abut-

ting Bell Roard, but it only amounts to a change in ingress and egress to the Parkway by traversing Bell Road in a different direction than formerly. That said action by the State Highway Department was in accordance with the provision of Section 4 of the Limited Access Highway Act of 1945, P. L. 1108.

It is the opinion of the Viewers that claimant's right to recover must rest upon some constitutional or statutory provision, and in the absence of such there can be no liability for damages imposed on the Commonwealth. Consequently claimant's right to damages is refused. However, the Viewers' award to T. J. McGOVERN, the sum of FIFTY and no/100ths ($50.00) DOLLARS for engineering services rendered in the preparation of the Viewers' Plan, said sum to be payable by the Commonwealth of Pennsylvania.

All of which is respectfully submitted this 5th day of April, 1960.

H. S. DOUGLASS
JOHN J. O'KEEFE
CHARLES M. HALLORAN
Viewers

Opinion

No. 2 November Sessions, 1959

No. 3 November Sessions, 1959

(Filed September 25, 1964)

Before: ALDISERT, BROSKY and PRICE, JJ.

ALDISERT, J.

The petitioner in each of the above cases is the owner of property abutting a limited access highway whose right of access thereon has been taken away by virtue of a physical barricade which the Commonwealth erected at the intersection of a public road and that highway.

The cases are before the Court on exceptions filed by the petitioners to the Reports of the Board of Viewers. Since identical issues are presented in each case, they will be treated as one.

At No. 2 November Sessions, 1959, Road Docket, Babcock Boulevard Land Company, Inc. (hereinafter called Babcock) filed its Petition for Viewers in the Court of Quarter Sessions of Allegheny County, alleging a condemnation of Babcock's property by the Commonwealth and requesting the appointment of viewers to assess damages.

At No. 3 November Sessions, 1959, Road Docket, a similar Petition for Viewers was filed by Red Jacket Company, Inc. (hereinafter called Red Jacket).

In both cases viewers were appointed, viewed the property involved, heard testimony and arguments, and filed Reports which were confirmed *nisi* on April 5, 1960.

The viewers in each case refused the claims of the petitioners for damages on the grounds that the action of the Commonwealth did "not constitute a condemnation and taking of any part of claimant's property", that the "action by the State Highway Department was in accordance with the provisions of Section 4 of the Limited Access Highway Act of 1945, P.L. 1108", and that in the absence of some constitutional or statutory provision, no liability for damages can be imposed on the Commonwealth.

The official transcripts of the testimony before the Board of Viewers have been made a part of the record in each case by orders of court consented to by all parties.

Pursuant to a plan approved by the Governor on June 2, 1950, the Commonwealth of Pennsylvania located and constructed in Allegheny County a limited access highway designated as Legislative Route 765, Section 3A, and popularly known as the Penn Lincoln Parkway West (hereinafter called Parkway).

This Parkway consists, for the most part, of two separate one-way roadways. One roadway (hereafter called Roadway East) extends East to Pittsburgh where it joins the Penn Lincoln Parkway East; the other roadway extends West to the Greater Pittsburgh Airport (hereafter called Roadway West). The only means of egress and ingress to the Parkway is by the use of various interchanges located at points along its route.

A portion of this Parkway is the result of incorporating an existing highway and converting it to one of limited access. The remaining portions, including the area material to these cases, were newly located and constructed.

At a point near the boundary line between Rosslyn Farms Borough and Robinson Township, at what is now known as the Rosslyn Farms Interchange, a one-way limited access ramp allowing ingress to the Roadway East only, designated Ramp A, was planned and actually constructed. At this point both the Parkway and Ramp A intersect, at roughly a 45° angle, a township road called Bell Road.

Bell Road originates in the Borough of Carnegie where it joins Bell Avenue and the general system of streets. Before the construction of Ramp A. and the Penn Lincoln Parkway West, it extended in a northerly direction through Robinson Township and into and through Rosslyn Farms Borough. It was laid out as a public road in proceedings at No. 5 June Sessions, 1852 of this court and afforded the properties of Babcock and Red Jacket access to the general system of streets in both directions. Bell Road remains a public road today even though there is testimony that its present condition makes passage thereon very difficult.

As a result of the construction of Ramp A at the Rosslyn Farms Interchange, Bell Road was terminated at the southern right of way line of Ramp A instead of continuing north into Rosslyn Farms Borough as it had previously. It now became possible to proceed from Bell Road and turn right onto Ramp A, and then onto the Roadway East, or to proceed from Rosslyn Farms east on Ramp A and turn right onto Bell Road.

Babcock's property lies on both sides of Bell Road with its northern boundary abutting on Ramp A and the Roadway East. In addition, it appears that this peti-

tioner also owns a tract of land on the other side of the Parkway abutting the Roadway West.

Red Jacket's property lies between and abuts both Bell Road and the Roadway East. Both properties were, at the time of the 1950 condemnation owned by an individual named George Peat.

On June 23, 1952 George Peat, petitioners' predecessor in title, for and in consideration of the sum of $8,000.00 executed and delivered to the Commonwealth of Pennsylvania a "Deed of Release and Quitclaim—Limited Access Highway", in which he released the Commonwealth of all claims "for or on account of any taking, injury, or destruction of property, through or by reason of the improvement of the said road (Legislative Route No. 765, Section 3A) * * * or through or by reason of the deprivation of the right of access, egress ingress to and from the section of highway, or through or by reason of the subsequent maintenance thereof according to the standards of the Department of Highways". A highway plan, prepared by the Commonwealth, showing the proposed improvement and the extent of the right of way to be taken was expressly made part of this Deed.

By this deed and plan the Commonwealth condemned and duly compensated the owner, George Peat, for that portion of his property shown by the plan to be required for the location and construction of Ramp A and the Parkway, and for all claims that would arise on account of this condemnation. The plan, besides showing the portion of Peat's property to be taken and injured, also contained data and specifications showing in exact detail how the proposed improvement would affect the

entire general area. The plan disclosed the right of way and slope requirements affecting the properties of other owners as well as the access point at the intersection of Bell Road with Ramp A. This access point was shown to be and is within the right of way taken by the Commonwealth.

Subsequently, Peat conveyed this property to Babcock Boulevard Land Company, Inc., which in turn later conveyed a portion thereof to Red Jacket Company, Inc.

On October 9, 1957, pursuant to a plan revision approved by the Governor, the access point at the intersection of Ramp A with Bell Road was closed by a physical barricade.

The result was the creation of a *cul-de-sac* or dead end whereby petitioners, as well as the general traveling public, lost the right of ingress to the roadway leading east to Pittsburgh and the right of egress from Rosslyn Farms Borough to Bell Road via the use of Ramp A.

After the erection of the barricade the only means of access remaining to them was through that end of Bell Road that connects with Bell Avenue and the general system of streets to the south. Thereafter it, was still possible to reach Rosslyn Farms Borough and the Roadway East, but to attain to the degree of access petitioners had prior to the 1957 plan revision necessitated added circuity of travel. It now became necessary to proceed through the general system of streets in the Borough of Carnegie to the next interchange to reach the Roadway East, a distance of approximately one and one-tenths of a mile, that interchange being approximately one mile away and the first possible destination on entering the

Roadway East at the Rosslyn Farms Interchange. But whereas petitioners formerly proceeded to the next interchange on a limited access two lane roadway, they now must travel over local service township and borough roads.

There was testimony before the Board of Viewers that as a direct result of the plan revision of 1957 and the erection of this barricade, petitioner Babcock's property suffered a loss of over $100,000 in estimated value, and petitioner Red Jacket's property suffered a loss of approximately $12,000. These losses were attributed to the fact that prior to the construction of the barricade the properies, having immediate access to the Parkway East by way of Bell Road and Ramp A, had the enhanced character of being eminently suited for light commercial use. It is contended that they lost this character with the destruction of the barricade.

This is the damage of which petitioners complain. Relying largely on the Creasy v. Stevens case, 160 F. Supp. 404, reversed 79 S. Ct. 1034, 360 U. S. 219, 3 L. Ed. 2d 1186 (holding that an abutting landowner's existing right of access is a property right, the total deprivation of which amounts to a taking), they allege that the closing of Bell Road at its intersection with Ramp A constitutes a taking of their property right without compensation and hence is in violation of the Fifth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 10, and Article XVI, Section 8, of the Pennsylvania Constitution; and that (as Creasy v. Stevens held), since Section 8 of the Limited Highway Act of 1945, P. L. 1108, 36 P. S. 2391, authorizes this, it is patently unconstitutional.

It is Commonwealth's position that the 1957 plan revision was motivated by traffic safety and public welfare considerations, that petitioners never possessed an abutter's right of access directly from their properties onto Ramp A and the limited access Parkway, and that their right of access to and from Bell Road, a public road, has never been affected. The Commonwealth contends that the law in Pennsylvania is clear that, in the absence of a Constitutional or statutory provision, the closing of Bell Road at its intersection with Ramp A, as authorized by Section 4 of the Limited Access Highway Act of 1945, *supra*, gave the petitioners no right to damages since it occurred wholly within the right of way area quit-claimed to and acquired by the State in 1952.

Since the act complained of is the erection of the barricade as authorized by the plan revision of 1957, the court is not concerned with the effect of the construction of Ramp A and the Parkway on petitioners' properties pursuant to the condemnation of 1952, except in two respects:

First, whether or not an abutting landowner is vested with a right of access where the State constructs a limited access highway adjacent to his property.

Secondly, whether or not the highway plan that was expressly made a part of the Deed of Quitclaim and Release executed by George Peat in 1952 gave him a contract right to the access point at the intersection of Bell Road with Ramp A as shown on that plan.

The basic issue before the court is whether or not the "easement" of access is a property right for the deprivation of which the Commonwealth is liable in damages under Article I, Section 10 of its Constitution.

This is a situation in which the property owners abut both a limited access highway and a public road leading onto that highway. We must determine whether or not:

(a) the creation of a limited access highway vests an easement of access in the abutting landowners; and

(b) the creation of a *cul-de-sac* is a "taking" of property for which the Commonwealth must respond in damages.

HISTORICAL CONSTITUTIONAL DEVELOPMENT

In any determination of the constitutional limitations upon the power of eminent domain, a basic declaration of what constitutes a taking of property in its constitutional sense is essential.

The Constitution of Pennsylvania contains two such limiting provisions. Article I, Section 10, which is substantially identical to the Fifth Amendment to the Federal Constitution, provides:

> "* * * nor shall private property be *taken or applied* to public use, without authority of law and without just compensation being first made or secured"

Article XVI, Section 8 provides:

> "Municipal and other corporations and individuals * * * shall make just compensation for property *taken, injured or destroyed* by the construction or enlargement of their works, highways or improvements * * *" (Emphasis supplied).

Two distinctions must be noted. The first is that while Article I, Section 10 applies to both the Commonwealth and those to whom it delegates this power, Ar-

ticle XVI, Section 8 by its terms applies only to "municipal and other corporations and individuals". Thus it is inapplicable where the Commonwealth itself is the condemnor. Com. v. McGrady, 399 Pa. 586, 592, 160 A. 2d 715; Ewalt v. Penn Turnpike Commission, 382 Pa. 529, 115 A. 2d 729; Soldiers and Sailors Memorial Bridge, 308 Pa. 484, 162 A. 2d 309.

The second distinction concerns the precise meaning to be given to the wards "taken or applied" in contradistinction to the words "property taken, injured or destroyed". Eminent domain being a sovereign power vested in the Commonwealth and an inherent attribute of sovereignty (Jacobs v. Clearview Water Supply Co., 220 Pa. 388, 69 At. 870, 21 L. R. A. (N. S.) 410; Philadelphia Clay Co. v. York Clay Co., 241 Pa. 305, 88 At. 487), it is logically apparent that the only limitations upon the free exercise of this paramount power to use property for the public benefit are those imposed either by the constitution or the legislature. Com. v. Plymouth Coal Co., 232 Pa. 141, 81 At. 148, affirmed 34 S. Ct. 359, 232 U. S. 531, 58 L. Ed. 713; Philadelphia Clay Co. v. York Clay Co., supra; Lazarus v. Morris, 212 Pa. 128, 61 At. 815.

Thus, in the absence of any statutory assumption of liability, the Commonwealth as condemnor is required to make compensation for property *taken,* but apparently is not under the same compulsion where property is *injured or destroyed.*

The concept of property in its constitutional sense has been undergoing a radical change in recent years. Though at common law the term denoted the legal significance of the rights of persons in relation to a tract

of land or a chattel, the meaning ascribed to the term at the time many of the eminent domain provisions were framed and adopted was synonymous to the subject matter itself. Instead of denoting the aggregation of the qualified rights of users, exclusion, enjoyment and disposition, the word "property" in the area of eminent domain embraced only the meaning often used in common parlance to denote the tract of land or chattel itself. (Sedgwick, Const. Law 2d ed. pp. 456-458; Lewis Eminent Domain, 3rd ed. §66(57).) Thus a "taking" in its constitutional sense meant a physical, tangible appropriation of the property of another.

In reference to this, the Supreme Court of the United States has said:

> "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizens, as those rights stood at the

> common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." Pumpelly v. Green Bay Co., 13 Wall. 166, 177, 1871.

Since 1871 a concept has gradually developed that any substantial interference, subversion, or obstruction of the essential attributes of ownership is a "taking" of property.

As *Corpus Juris* defines and as often cited with approval by our courts, a taking is "any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner * * *" 20 C. J. 566; Caplan's Appeal, 293 Pa. 483, 490; Miller v. Beaver Falls, 368 Pa. 189, 196, 82 A. 2d 34.

In holding that low and frequent flights of aircraft taking off from and landing at an airport substantially interfered with an owner's use and enjoyment of his land and constituted the "taking" of an air easement over the property, our Supreme Court has said in the case of Griggs v. Allegheny County, 402 Pa. 411, 414, reversed 82 S. Ct. 531, 369 U. S. 84, 7 L. Ed. 2d 585, a "taking" occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property. In U. S. v. Causby, 328 U. S. 256, a similar definition is given.

Wherefore we think it indisputable that, unlike former times, to constitute a "taking" there is no need today for an actual, physical seizure of land and that "whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree

abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto,* taken, and he is entitled to compensation." Miller v. Beaver Falls, supra.

ABUTTERS EASEMENT RIGHTS

The nature of an abutting owners' right of access is what is known in law as an "easement appurtenant". It not only enables the owner to enter and leave his premises by way of the public road, but also establishes the accessibility of his premises for his patrons, clients, and customers. 28 C. J. S. Easements, §§ 1-4; 25 Am. Jur., Highways, § 154; 39 C. J. S. Highways, § 141; Restatement, Servitudes, §§ 450, 453, 507; 10 McQuillin Municipal Corporations, 671 (3rd ed. 1950).

It arises as a private contract right where an owner of land subdivides it into lots and streets, and a purchaser relies on a plan showing his lot to be on a street. O'Donnell v. Pittsburgh, 234 Pa. 401; Chambersburg Shoe Mfg. Co. v. Cumberland Valley Railroad Co., 240 Pa. 519; McGarrity v. Commonwealth, 311 Pa. 436, 166 At. 895; Walsh v. Scranton, 23 Pa. Superior Ct. 276; Lang v. Smith, 113 Pa. Superior Ct. 559.

Aside from a private contract right, the real source of the right of access is generally conceded to have arisen by the judicial decisions in the so-called "elevated railway cases". Under the New York statutes establishing streets, it was held that a trust was created for the benefit of the public at large as well as for the owners of abutting property. The exclusion of the public and the diversion of the streets to private use violated the rights of the abutters and authorized them to recover

the property-value losses traceable to the breach of trust. Story v. New York Elevated R. R., 90 N. Y. 122; Lahr v. Metropolitan Elevated Ry., 104 N. Y. 268, 10 N. E. 528; Clarke, The Limited Access Highway, 27 Wash. L. R. and State Bar J. 111, 117; Freeways and the Rights of Abutting Owners, 3 Stanford L. R. 298; Cunningham, The Limited Access Highway From a Lawyer's Viewpoint; 13 Mo. L. R. 19, 31; 41 Yale L. J. 221.

Lewis, in his work, Eminent Domain, § 121 (91 f) (3rd ed. 1909), draws these access rights from an analogy with the private contract right cases.

In tracing the origin of the whole doctrine of abutter's rights, Mr. Justice Holmes commented in Muhlker v. New York & H. R. Co., 197 U. S. 544, 572, 25 S. Ct. 522, 528, 49 L. Ed. 872:

> "The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purpose of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York courts had decided that, apart from statute or express grant, the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantages of the expectation that a street would remain open and a right *in rem* that it would remain so * * * But again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropria-

tion of the street to the uses of the public * * * it was possible for the New York courts to hold, as they seem to have held, that *the easement* which they had declared to exist *is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right,* as against what I have called the parasitic right which the plaintiff claims." (Emphasis supplied).

STATE COURTS DEFINE EASEMENT

The Supreme Court of the United States has declared that:

> "The same law which declares the easement defines, qualifies and limits them. Surely such question must be for the final determination of the State Court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; it may determine that he has a limited easement, or it may declare that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, * * * and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy." Sauer c. New York, 206 U. S. 536, 548, 27 S. Ct. 686.

Thus, while the Fifth Amendment of the United States Constitution applies to the states via its incorporation into the Fourteenth Amendment, (Penn Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322)

both are clearly inapplicable with regard to the question of abutters' rights. Sauer v. New York supra; U S. v. Powelson, 319 U. S. 266, 279; Reichelderfer v. Quinn, 287 U. S. 315, 319, 53 S. Ct. 177, 77 L. Ed. 331, 83 A. L. R. 1429; Meyer v. City of Richmond, 172 U. S. 82, 19 S. Ct. 106, 43 L. Ed. 374.

STATE HOLDINGS WIDELY DIVERGENT

An examination of the law in other states discloses a wide divergence on this subject. Persuasive precedents can be found on both sides and the decisions are totally irreconcilable. Even where the constitutional guarantees are identical in phraseology, namely, requiring compensation for property "taken", or "taken or applied", or "taken or damaged", or "taken or destroyed", or "taken or injured", the various jurisdictions have not agreed in the interpretation of these terms. For example, Massachusetts, New Hampshire and Tennessee all provide that property shall not be "taken or applied to public use without just compensation * * *" But whereas Massachusetts and New Hampshire have declared that access is not a property right, Tennessee allows recovery in such cases. Davis v. County Com'rs., 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; Cram v. City of Laconia, 71 N. H. 41, 51 A. 635, 57 L. R. A. 282; Illinois Cent. R. Co. v. Moriarity, 135 Tenn. 446, 186 S. W. 1053.

Numerically, the preponderance lies with those states holding that access is a property right within the constitutional guaranty of just compensation. Nearly all commentators concur in this conclusion. 29 C. J. S. Eminent Domain § 105; 18 Am. Jur. Eminent Domain § 158, 183; 49 A. L. R. 330; 93 A. L. R. 639; McQuillan,

Municipal Corporations, 2d Ed. vol. 4, §§ 1526-1527; Lewis, Eminent Domain, 3rd Ed., vol. 1 § 121; 16 Harv. L. R. 372; 39 Yale L. J. 128; 27 Wash. L. R. and State Bar J. 111; 3 Stanford L. R. 298. However, agreeing on this essential point, they differ considerably in fixing its precise nature and extent.

Petitioners rely on the cases of Breinig v. Allegheny County, 332 Pa. 474, Walsh v. Scranton, 23 Pa. Superior Ct. 276, Lang v. Smith, 113 Pa. Superior Ct. 559, and Stuart v. Gimbel Bros., 285 Pa. 102, for the proposition that access is a property right in Pennsylvania. They rely on the case of Creasy v. Stevens, supra, for the propositions that no physical appropriation of land is necessary to constitute a taking of private property and that *the total deprivation of an existing right of access* is a taking of property for which the Commonwealth must make just compensation.

We cannot agree with this conclusion.

The cases cited by the petitioners and by the case of Creasy v. Stevens were declarations of abutters' rights under Article XVI, Section 8 of the Pennsylvania Constitution and various statutory enactments expressly assuming liability where the condemnor is one other than the Commonwealth itself. While we concur both in the holding that there need no longer be a physical appropriation of land to constitute a taking of property, and that access is a property right by virtue of Article XVI, Section 8 and various legislative enactments applicable to "municipal and other corporations and individuals", we cannot agree that this amounts to a declaration that access is a compensable property right where the condemnor is the Commonwealth.

Only Article I, Section 10 of the Pennsylvania Constitution is applicable where the Commonwealth is the condemnor and the question is one of abutters' access rights.

Article I, Section 10 differs greatly from Article XVI, Section 8 in concept.

Where Article XVI, Section 8. guarantees a just compensation where property is "taken, injured, or destroyed", Article I, Section 10 guarantees a right to damages only where land is "taken or applied" to public use. Eminent domain being an inherent power of sovereignty, in the absence of legislative enactments the sole qualifications on the full exercise of that power are those imposed by the constitution itself. Thus, to say that access is a property right because Article XVI, Section 8 and various legislative enactments have *vested a* right of compensation in property owners where the condemnor is a municipal or other corporation or individual, is not a declaration that the same limitation is mposed where the Commonwealth is the condemnor.

As the Supreme Court of the United States has said:

> "Surely such question must be for the final determination of the State Court. It has authority to declare that the abutting landowner has no easement of any kind * * *, it may determine that he has a limited easement, or it may declare that he has an absolute and unqualified easement." Sauer v. New York, supra.

Therefore, in the absence of statute, petitioners must establish their right to compensation under Article I, Section 8 of the Pennsylvania Constitution or not at

all. Monongahela Navigation Co. v. Coons, 6 W. & S. 101; Sharpless v. Mayor of Philadelphia, 21 Pa. 147; Best v. Zoning Board of Adjustment of City of Pittsburgh, 393 Pa. 106, 141 A. 2d 606.

The courts of Pennsylvania have always held, prior to the Griggs v. Allegheny County case (supra) that Article I, Section 10 of its Constitution requires an actual appropriation of land to constitute a "taking" of property and that the Commonwealth, in the absence of any statutory assumption of liability, is not liable for damages in the absence of such "taking". State Highway Route No. 72, 265 Pa. 369, 375; Hoffer v. Reading Co., 287 Pa. 120, 124; Soldiers and Sailors Memorial Bridge, 308 Pa. 487, 491, 492; McGarrity v. Commonwealth, 311 Pa. 436, 438; Locust St. Subway Construction, 117 Pa. Superior Ct. 86, 90, 92, 93; Heid v. Allegheny County, 122 Pa. Superior Ct. 312, 315; Heil v. Allegheny County, 330 Pa. 449, 453; Brewer v. Commonwealth, 345 Pa. 144, 145; Koontz v. Commonwealth, 364 Pa. 145, 147; McCrady Case, 399 Pa. 586, 591.

It has been held that in the absence of a statute there is no liability for damages when a street or highway is vacated. Heil v. Allegheny County, supra, and cases cited therein. It has relegated all other injuries to the area of "*damnum obsque injuria*" or consequential damages for which there is no right to compensation. Soldiers and Sailors Memorial Bridge, supra. However, when land is taken for highways, the abutting owner retains the right of access as an incident to ownership of the remainder of his land. McCrady Case, supra, and cases cited therein.

The issue thus narrows itself to a determination whether the holding of the Griggs v. Allegheny County case that "a taking occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property" amounts to a declaration that henceforward access is to be a compensable property right in cases where the Commonwealth is the condemnor.

In view of the long line of cases cited above and the declaration of our Supreme Court that they are the well-established principles of law within this state, it is our opinion that it does not.

And if, in the absence of statute, access is not a property right where the Commonwealth is the condemnor, then it would be patently improper for a lower court within this jurisdiction to create a new right by the simple process of redefining its Constitution.

DISCUSSION OF CONTRACT RIGHT

The petitioners further contend that the highway plan showing the access point at the intersection of Bell Road and Ramp A, which was expressly made part of the deed of quit-claim and release executed by George Peat, created a contract right in the petitioners in the nature of a private easement of access.

As previously indicated, that plan disclosed not only how the land of the petitioners' predecessor in title would be directly taken and injured, but also how and to what extent the proposed improvements would affect that entire general area. It showed how the lands of other property owners would be taken and injured, and contained

numerous engineering details and specifications totally unrelated to Peat's land.

Common sense would indicate that there was no intent that the plan should confer on George Peat, a contract right to require the Commonwealth to take so much of his neighbor's land and no more, that within its right of way the Commonwealth may do nothing in the way of additions and improvements without his consent, and that, in effect, the Commonwealth be required to surrender its police power over that portion of the Parkway to his discretion.

The facts here are wholly unlike the situations out of which a private contract right of access is said to arise. The essential difference is one of intent.

Where one subdivides one's property into lots and plots streets thereon, one either intends that purchasers should rely on the plan showing their lots to be on a street or one intends to vest an express easement in those streets in the purchasers. In both cases the result is the same; the primary intent is to confer a private right upon each purchaser of a lot within that plan.

However, under the facts before the court, it is quite evident that the Commonwealth, in planning and constructing the access point between Bell Road and Ramp A, and the limited access highway, had only in mind its primary benefit to the entire traveling public.

It had no intent to confer a private contract right upon anyone. In fact, we may presume that there is an express reservation that should this access point prove detrimental to the general welfare and safety of the traveling public, the Commonwealth retains the police

power to control, modify or eliminate this access point. There being no intent to confer a private right of easement in any single landowner, it is the opinion of this Court that the mere fact that an access point at the intersection of Bell Road and Ramp A was plotted on the highway plan that was made part of the deed executed by George Peat, is insufficient to establish that a private contract right or easement was granted him in rerogation of the power of the Commonwealth to regulate its highways in the best interests of the general traveling public.

By the terms of this Deed of Quitclaim and Release, George Peat surrendered to the Commonwealth all claims arising from the 1950 condemnation whether it be the taking of the right of way for the proposed Parkway, the denial of access from the portions of his land abutting the limited access highway, the severance of the parts of Bell Road in Robinson Township from the portion lying in Rosslyn Farms Borough, the separation of Peat's property by the Parkway itself, or any other claim "for or on account of any taking, injury, or destruction of property, through or by reason of the improvement of the said road, * * * or through or by reason of the deprivation of the right of access, egress and ingress to and from the section of highway * * *."

The taking, injury, and destruction of property pursuant to the 1950 condemnation having been compensated for and no private contract right to the access point between Bell Road and Ramp A having accrued, the action of the Commonwealth pursuant to the 1957 plan revision constituted a separate and distinct occurrence unrelated to the 1950 condemnation.

Since the erection of the barricade within the right of way lines acquired by the Commonwealth falls in the category of consequential damages, as defined in Soldiers and Sailors Memorial Bridge, supra, the Court is constrained to hold that there has been no "taking" of property within the meaning of Article I, Section 10 of the Pennsylvania Constitution as a matter of law.

But assuming that some measure of access is necessary for the beneficial use and enjoyment of property, assuming that the holding of the Griggs v. Allegheny County case, supra, amounted to a declaration by our Supreme Court that henceforth access is to be a compensable property right within the meaning of Article I, Section 10 of its Constitution, and assuming that petitioners have not released to the Commonwealth the claims arising from the 1950 condemnation, then this Court must determine whether or not a right of access accrues to an abutting property owner where the Commonwealth creates a limited access highway, and whether or not a right to just compensation accrues where the Commonwealth has created a *cul-de-sac* or dead-end.

The facts and issues before the Court are not those presented in the case of Creasy v. Stevens, supra. In that case there was the *total* destruction of an *existing* right of access by the conversion of an existing highway into one of limited access. In this case, the portions of the limited access highway upon which petitioners abut were newly located and constructed and the creation of a *cul-de-sac* by terminating a street at its intersection with a limited access highway is not a *total* deprivation of access.

Transportation is a basic need of mankind. It is a fundamental ingredient in the spread of civilization, the growth of commerce, and the acquisition of livelihoods. But with each socio-economic advance has come more and more traffic congestion and mounting personal injuries, death tolls, and billions in property loss. Our highway systems become increasingly inadequate with each passing year in spite of the billions of dollars annually spent for the construction and maintenance of public roads. The presence of unlimited entrances to the highway, the parking, the commercial use of roadsides, and the frequent ingressing and egressing from the traffic stream, all conspire to promote congestion and peril for the traveler.

The high cost of highway facilities has already seriously impeded their construction. Thus the determination of the precise extent of an abutter's right of access should be the result of a weighing of the relative interests of the public and the individual, so as to arrive at a just balance. Neither should the function of the government to act for the public good be unduly restricted, nor should the constitutional policy of insuring the individual against an unreasonable loss, occasioned by the exercise of governmental power, be violated.

The factors that should be considered are, on the one hand, the magnitude of the damage to the owner of land, and, on the other, the desirability and necessity for the particular type of improvement and the danger that the granting of compensation will tend to retard or prevent it. Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321;

Bacich v. Board of Control of California, 23 Cal. 2d 343, 144 P. 2d 818; 34 Columb. L. R. 938; 42 Columb. L. R. 596.

As previously indicated, the Supreme Court of the United States has repeatedly declared that the recognition and definition of interests within the term "private property" are essentially matters for each state to determine. Meyer v. City of Richmond, supra; Sauer v. New York, supra; Reicheldfer v. Quinn, supra; U. S. v. Powelson, supra.

If an abutter is given a right of access at every point at which his property abuts, namely an absolute right of access, then every degree of "injury", whether it be the vacation of streets, the creation of separate traffic lanes, the prohibition of U-turns, the designation of one way streets or any of the other numerous regulations usually imposed, become in some measure compensable.

The result is the destruction of the distinction between Article XVI, Section 8 and Article I, Section 10, and the difference between the concept of the "taking" of property and the "injury and destruction" of property will have ceased to have any meaning. The cost of improvements will clearly become prohibitive.

If a total denial of access is non-compensable where the Commonwealth is the condemnor, then theoretically the Commonwealth can, by the erection of high barriers around the entire circumference of one's property, totally deny a property owner of the beneficial use and enjoyment of his property without liability.

The third alternative implements the concept that some measure of access is necessary for the beneficial use and enjoyment of property, and that the total destruction of existing access constitutes a "taking" of property.

The right is one of adequate and reasonable access which, when it becomes vested from use, becomes a property right. There then need be no fear that individual rights will be unduly subordinated to the rights of society, for each claimed exercise of governmental power is subject to judicial examination.

The limitation and regulation of highway traffic comes under the police power (25 Am. Jur., Highways § 253; 40 C. J. S. Highways § 232), and highways exist primarily for the benefit of public travel. But the exercise of this primary right, without just compensation, should not be in derogation of the fundamental and traditional attributes of property. Thus the use of streets and highways may be limited, controlled, and regulated by public authority in the exercise of the police power whenever and to the extent necessary to provide for and promote the public safety, peace, health, and the general welfare of the people, but never to the degree that all existing rights of access are destroyed.

Some courts have attempted to solve the *cul-de-sac* problem by declaring that only those property owners abutting the block on which the obstruction or vacation occurs are entitled to damages. This seems to us unrealistic, since property on the same street in the next block may likewise be diminished in value as a result of the improvement and the owners may be similarly inconvenienced by circuity of travel.

Recovery should not depend upon the accident of location. If an injury different in kind from that suffered by the general traveling public is required as the prerequiste to a right of recovery, then a destruction of access amounting to a taking of the beneficial use and enjoyment of property should be required. The rule should be that the right of ingress and egress consists of an adequate and reasonable access from the property to the street, that it does not extend to the full width or the full length of the sreet, or even to all points upon the street in front of the abutting property. It is sufficient if there is access to a street that in turn connects with the general street system. Any omprovement that does not materially interfere with such access does no compensable damage.

We are fully aware of the decisions that have held the depreciation of property in value to be the criteria of compensable damage but *they have never been applicable where the Commonwealth has been the condemnor.*

If that criteria is to be adopted, then justice dictates that the right of recovery should not be limited to those abutting the block on which the obstruction or vacation occurs. (See cases collected in 49 A. L. R. 330; 92 A. L. R. 639; McQuillin, Municipal Corporations, 2d ed., Vol. 4 § 1425 *et seq.*) Furthermore, diminution in value as a criteria for a special injury has been forcefully repudiated by Mr. Chief Justice Stone in the case of Reichelderfer v. Quinn, supra.

The rule of adequate and reasonable access is fully and logically consonant with the unanimous opinion throughout the country that the inconvenience oc-

casioned by a necessary circuity of travel, *in the absence of arbitrary action,* is one shared in common with the general public and noncompensable. It is in full accord with the philosophy enunciated in the case of Breinig v. Allegheny County, supra.

Under this rule, the injury suffered by the petitioners is noncompensable. The *cul-de-sac* created by the termination of Bell Road at its intersection with Ramp A, as authorized by the 1957 plan revision, in no way denied them access to the general system of streets. Uncontradicted testimony before the Board of Viewers discloses that to attain to the degree of access petitioners had had previously merely entailed, with small circuity of travel, the use of existing township and borough roads instead of a limited access ramp and two-lane limited access roadway.

The limited access highway is the culmination of a search for a type of facility that would provide for the safe, efficient, economical, and expeditious movement of traffic without the attendant hazards of conventional, general service highways. The wide and proven benefits derived from their presence make them eminently desirable in terms of traffic congestion, delays, and motor vehicle accidents.

All the authorities are in agreement that where an entirely new limited access highway is located and constructed, there is no duty to compensate an abutting landowner for the loss of a right of access which he never had. Clarke, The Limited Access Highway, *supra;* Cunningham, The Limited Access Highway From a Lawyer's View point, *supra;* Freeways and the Rights of Abutting Owners, *supra.* These three articles have con-

sistently been quoted as being the authorities on this subject (Citations omitted).

CONCLUSIONS

It is therefore the opinion of this Court that:

1. While the physical appropriation of land is no longer necessary to constitute a "taking" of property, access is as yet a compensable property right within the meaning of Article I, Section 10 of the Pennsylvania Constitution.

2. The Fifth and Fourteenth amendments of the United States Constitution and Article XVI, Section 8 of the Pennsylvania Constitution are inapplicable where the issue is one of access rights and the Commonwealth is the condemnor.

3. The creation of a new limited access highway vests no right of access in the abutting owners.

4. The Deed of Quitclaim and Release executed by George Peat, petitioners' predecessor in title, released the Commonwealth from all claims arising out of the 1950 condemnation.

5. The highway plan that was expressly made a part of that deed created no contract right in the nature of a private easement to the access point at the intersection of Bell Road with Ramp A.

6. The barricade at that intersection pursuant to the 1957 plan revision as approved by the Governor and authorized by Section 4 of the Limited Access Highway Act of 1945, P. L. 1108, did not constitute a "taking" of

property within the meaning of Article I, Section 10 of the Pennsylvania Constitution.

7. If access is a property right within the meaning of Article I, Section 10, it is only a right to an adequate and reasonable access, which has not been denied the petitioners.

8. If access is a property right within the meaning of Article I, Section 10, the creation of a *cul-de-sac* is not a compensable injury where the property owner still retains access to the general system of streets and the condemnor is the Commonwealth.

9. In the absence of an act of the legislature expressly assuming liability, there has been no "taking" of property as a matter of law.

Wherefore, the exceptions to the Reports of the Board of Viewers were dismissed and the Reports of the Board of Viewers confirmed.